**NO. SC85936**

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**IN THE**
**SUPREME COURT OF MISSOURI**

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**STATE OF MISSOURI**,

**Respondent,**

**v.**

**ALINE POWERS,**

**Appellant.**

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**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI**
**TWENTY-FIRST JUDICIAL CIRCUIT**
**THE HONORABLE DAVID LEE VINCENT, III, JUDGE**

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# RESPONDENT'S STATEMENT, BRIEF AND ARGUMENT

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## JURISDICTIONAL STATEMENT

This is an appeal from a conviction for the class C felony of stealing third offense, §§570.030 and 570.040, RSMo 2000, obtained in the Circuit Court of St. Louis County, for which appellant was sentenced to nine months in the Missouri Department of Corrections.[1] After an opinion by the Missouri Court of Appeals, Eastern District, this Court granted transfer pursuant to Supreme Court Rule 83.04. Therefore, jurisdiction lies in this Court. Article V, § 10, Missouri Constitution (as amended 1982).

## STATEMENT OF FACTS

[1] Section 570.030 RSMo was subsequently amended in 2001, 2002, and 2003. Section 570.040 RSMo was amended in 2002 and in 2003. The crime for which appellant was on trial was committed on May 28, 2001 (L.F. 7-8). Accordingly, the subsequent amendments have no relevancy except as discussed in Point IV.

Appellant, Aline Powers, was charged in the Circuit Court of St. Louis County with one count of the class C felony of stealing third offense (L.F. 7-8). On May 1 and 2, 2002, appellant was tried before a jury, the Honorable David Lee Vincent presiding (Tr. 4-307). Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

Around 5:50 p.m., on May 28, 2001, appellant entered the Shop N' Save store at 45 Gravois Bluff Plaza Drive in St. Louis County (Tr. 158, 160). Appellant walked from the pharmacy entrance door and picked up Non-Drowsy Sudafed, Extra Strength Bayer Aspirin, Visine and Theraflu (Tr. 162). Appellant then proceeded to the beer display, where she picked up an empty beer box and placed the items in the box (Tr. 162-163). Next, appellant walked to the frozen food area, picked up three quarts of Tropicana orange juice and placed them in the box (Tr. 164). Then, she left the store from the pharmacy "entrance-only" door without paying for the items (Tr. 165-168). Appellant's son activated the entrance door from outside enabling appellant to exit the store (Tr. 165-168, State's Exhibit 1A).

James Toppett, the loss prevention officer of Shop N' Save, observed appellant's actions on a circuit televison in the security office (Tr. 159-162, 210). When appellant went to the frozen food area, Toppett exited the security office to observe appellant because the security cameras did not provide a view of that area (Tr. 164). Toppett saw appellant pick up the orange juice, put it in the box and proceed to leave the store without paying (Tr. 159-169, 199-200). Toppett followed appellant outside and apprehended her (Tr. 199-201). He found the box with the items in the parking lot and took appellant back to the security office (Tr. 200-

202). Appellant was "pretty adamant on leaving" (Tr. 200). She attempted to leave the office several times (Tr. 200).

Officer Mark Graig with the St. Louis County Police Department was called to Shop N' Save (Tr. 244). He arrested appellant and transported her to the police department for booking (Tr. 146). The inventory search of appellant revealed $2,300 in her possession (Tr. 248).

Appellant did not testify at trial and did not present any evidence. At the close of all evidence, the jury found appellant guilty as charged (L.F. 58).

On December 6, 2002, the trial court sentenced appellant to four years in the Department of Corrections (L.F. 70, Sent Tr. 2-25). On December 15, appellant filed a motion alleging that pursuant to an amendment to Section 570.040, appellant must have served at least ten days in jail for her prior stealing convictions before the state could charge her with the class C felony of stealing third offense (L.F. 78-80). §570.040, RSMo 2000, Cum. Supp. 2002 (effective August 28, 2002). The state agreed that it did not prove that appellant served any time for the stealing convictions that the state used to enhance the crime to a class C felony (Sent. Tr. 26-32).

On December 19, 2002, the trial court resentenced appellant to nine months imprisonment pursuant to Section 1.160 RSMo (Sent. Tr. 28-29, 33; L.F. 84). *See* §1.160, RSMo 2000 ("[I]f the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense prior to original sentencing, the penalty or punishment shall be assessed according to the amendatory law").

On February 17, 2004, the Court of Appeals, Eastern District, affirmed appellant's conviction and sentence. State v. Powers, E.D. No.82209 (Mo. App., E.D. 2004). Thereafter, appellant sought, and this Court granted transfer. This appeal follows.

## ARGUMENT

### I.

**THE TRIAL COURT DID NOT ERR IN ADMITTING STATE'S EXHIBITS 1 AND 1A BECAUSE THE STATE LAID A PROPER FOUNDATION IN THAT JAMES**

**TOPPETT PERSONALLY OBSERVED THE EVENTS DEPICTED ON THE TAPES AND TESTIFIED THAT STATE'S EXHIBIT 1 AND 1A ACCURATELY DEPICTED APPELLANT'S ACTIONS DURING THE COMMISSION OF THE CRIME.**

In her first point, appellant claims that the trial court erred in admitting State's Exhibits 1 and 1A, because the state did not lay a proper foundation for their admissibility (App. Br. 15-23). Appellant argues that the state failed to show that the recording device accurately recorded the events, that the surveillance monitor accurately displayed what was happening in the store, and that State's Exhibit 1A was not a complete and unaltered copy of the original surveillance tape (State's Exhibit 1) (App. Br. 15, 18-23).

***Facts***

Prior to trial, appellant objected to the admission of the surveillance tape from Shop N' Save on the basis that nobody constantly observed the recording, that the original videotape was mailed to be duplicated and that the duplicate altered the original tape (Tr. 14-15). The court overruled appellant's objection (Tr. 15).

At trial, James Toppett testified that as a loss prevention officer, he had "many years" of training in the use of surveillance cameras, and that on May 28, 2001, he tested the surveillance equipment by playing back the surveillance tape from the previous day (Tr. 176-177). Toppett testified that the equipment was functioning properly and that he placed a blank tape to record the surveillance from May 28 (Tr. 176-177). Toppett testified that State's Exhibit 1 was the original surveillance tape recorded in multiplex format on the store's surveillance equipment and that if viewed on a regular VCR, State's Exhibit 1 "would flash

through the pictures real quick [and] [w]e would not be able to see anything." (Tr. 177-179). He stated that he observed on the surveillance monitor the events depicted on State's Exhibit 1 as they were happening and that State's Exhibit 1 accurately reflected the events on May 28 (Tr. 160-162, 177-178, 715-176).

Toppett testified that he gave State's Exhibit 1 to his immediate supervisor, Matt Schrader, who took the tape to a store that had the capacity to duplicate it on a regular VCR tape and identified State's Exhibit 1A as the duplicate (Tr. 179-182). The duplicate was marked at trial as State's Exhibit 1A (Tr. 182, 194). Toppett testified that he viewed State's Exhibit 1A and that it truly and accurately represented the events on May 28, 2001 (Tr. 182-183).

During a *voir dire* examination by appellant, Toppett stated that the multiplex unit recorded views from all 16 cameras in the store (Tr. 183-184). He testified that on May 28, before appellant arrived at the store, Toppett played what was recorded on the surveillance tape from that day to make sure that the equipment was working properly (Tr. 188-189).

Toppett testified that after the crime, he locked the original surveillance tape in a filing cabinet and that only he had access to the cabinet (Tr. 190-191). Toppett stated that he gave the tape to Matt Schrader to duplicate it on a regular videotape and that Schrader returned it to him (Tr. 191). According to Toppett, he and Schrader selected the views to be recorded on the duplicate, which included only the views on which appellant appeared (Tr. 192-193). Toppett testified that he took both videotapes to his house when he received the notice for his first appearance in court (Tr. 190). He stated that he could not watch the original tape in his home, but that he watched the duplicate (Tr. 193-194).

The court again overruled appellant's objection to the admission of State's Exhibits 1 and 1A (Tr. 193-194).

The state then played State's Exhibit 1A, the duplicate videotape, and James Toppett explained appellant's actions portrayed on the tape (Tr. 195-197). Toppett explained that he left the security office when appellant went to the frozen food isle to observe her personally and that the tape did not show the stealing of the orange juice (Tr. 197-198, 203-204).

***Analysis***

"The trial court has wide latitude in ruling on whether to admit or exclude evidence. Absent a clear abuse of discretion, we will not interfere with that ruling. We will find an abuse of discretion only if the trial court ruling clearly offends the logic of the circumstance or appears arbitrary and unreasonable." State v. Strughold, 973 S.W.2d 876, 887 (Mo. App., E.D. 1998)(citations omitted).

The admissibility of videotapes as evidence is determined by the same principles governing the admissibility of still pictures. State v. Spica, 389 S.W.2d 35, 46 (Mo. 1965), cert. denied 383 U.S. 972 (1966). Videotapes are admissible upon laying of a proper foundation. State v. Molasky, 655 S.W.2d 663, 668 (Mo. App., E.D. 1983). The party offering the videotape must show that it is an accurate representation of what it purports to show and the foundation may be established through the testimony of any witness who is familiar with the subject matter of the tape and competent to testify from personal observations. Phiropoulos v. Bi-State Development Agency, 908 S.W.2d 712, 714 (Mo. App., E.D. 1995).

"If after a preliminary examination, the trial judge is satisfied that the sound moving picture reproduces accurately that which has been said and done ..., then [] the sound moving picture [should] go to the jury." State v. Molasky, supra at 668, quoting State v. Lusk, 452 S.W.2d 219, 224 (Mo. 1970); *see also* State v. Hendricks, 456 S.W.2d 11, 13 (Mo. 1970)(videotape is admissible when properly identified and material to an issue).

In the present case, James Toppett testified that State's Exhibits 1 and 1A accurately depicted the events on May 28, which Toppett observed as they were happening (Tr. 160-162, 177-178, 715-176). This testimony was sufficient to establish a proper foundation for the admissibility of the videotape. *See* State v. Spica, supra at 46 (testimony that a motion picture correctly portrayed what was observed by the eyewitnesses establishes a foundation for the admissibility of the recording); and State v. Molasky, supra at 668 (the defendant's testimony identifying the events recorded on a videotape and the expert testimony that the videotape was the original, was sufficient to establish a proper foundation for the admission of the tape).

Appellant argues that Toppett's observations were not personal because he watched the events on the security monitor (App. Br. 20). However, Toppett observed the events as they were happening, "in real time" (Tr. 159-177). The fact that he observed the events on the surveillance monitor as opposed to walking to the isle and viewing them from a close distance did not change the nature of his observations. *See* People v. Tharpe-Williams, 676 N.E.2d 717, 721 (Ill. App., 1997)(the security officers who viewed the incident on a surveillance camera as it occurred had a personal knowledge of the events); *see also* Seals v. State, 869 So.2d 429, 433 (Miss. App., 2004)(witness who observed the events can authenticate a videotape by

testifying that the tape correctly depicted the events); Wilson v. Virginia, 511 S.E.2d 426 (Va. App., 1999)(authentication is proper when a witness with knowledge testifies that the videotape accurately portrays the events).

Appellant further claims that Toppett could not lay a proper foundation for the admissibility of the tapes because he was not a mechanic (App. Br. 16). Appellant does not cite any authority for the proposition that the state must call a mechanic before it can play the surveillance tape to the jury. Toppett had training and knowledge in the use of the surveillance equipment, he tested it on the day of the crime and determined that the equipment was operational (Tr. 176-177, 188-189). The jury was able to view the videotape and to determine that it depicted appellant. It is clear that the equipment was functional, that Toppett knew how to operate it.

Moreover, appellant did not dispute at trial the accuracy of the events depicted on the tape; rather, she argued that her actions showed that she was not stealing because she never put anything in the her purse and that she abandoned the items (Tr. 286-291). In light of the undisputed evidence that the surveillance tape accurately depicted the events for which appellant was on trial, appellant cannot show that there was insufficient foundation for the admissibility of the tapes.

Appellant also claims that the duplicate tape was inadmissible because it omitted the views from the original videotape on which appellant did not appear (App. Br. 22).

This argument fails because to be admissible, the videotape must be relevant to a material issue in the case. State v. Hendricks, 456 S.W.2d at 13. Here, State's Exhibit

1A depicted only the admissible and relevant portions of the original surveillance tape which included only the scenes on which appellant appeared (Tr. 179, 184, 192). Accordingly, appellant cannot show that State's Exhibits 1A was improperly admitted.

Appellant lastly argues that there was no proper foundation for the admission of the duplicate because the original videotape was duplicated by Toppett's supervisor and Toppett had no knowledge of the dubbing process (App. Br. 21). Appellant ignores the fact that Toppett viewed the duplicate and testified that it accurately depicted the events of May 28 (Tr. 192-193). This testimony provided a proper foundation for the admission of State's Exhibit 1A. Accordingly appellant's claim should be denied.

**II.**

**THE TRIAL COURT DID NOT PLAINLY ERR IN ADMITTING STATE'S EXHIBIT 1A BECAUSE 1) IT DID NOT VIOLATE THE BEST EVIDENCE RULE IN THAT THE ORIGINAL WAS NOT VIEWABLE ON A REGULAR VCR, 2) IT WAS NOT A SUMMARY OF THE ORIGINAL VIDEOTAPE, 3) IT DID NOT VIOLATE THE COMPLETENESS RULE IN THAT IT SHOWED ALL OF APPELLANT'S ACTIONS IN SHOP N' SAVE RECORDED ON THE SURVEILLANCE VIDEOTAPE AND 4) THE STATE DID NOT WITHHOLD POTENTIALLY EXCULPATORY INFORMATION IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963) AND SUPREME COURT RULE 25.03.**

In her second point, appellant claims that the trial court erred in admitting State's Exhibit 1A because it violated the best evidence rule, because it was inadmissible as a summary of the original tape, it violated the rule of completeness and it violated the rules of discovery (App. Br. 24-29).

Appellant failed to object at trial to the admissibility State's Exhibit 1A on the basis of the best evidence rule, inadmissible summary, the completeness rule, and the rule of discovery (Tr. 14, 194). She also failed to include her claims of violation of the completeness rule and

discovery rule in her motion for new trial (L.F. 67-69). Accordingly, appellant's claim is not preserved for appellate review and should be reviewed, if at all, for plain error only. State v. Solis, 87 S.W.3d 44, 47 (Mo. App., W.D. 2002); Supreme Court Rule 30.20.

"The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." State v. Roberts, 948 S.W.2d 577, 592 (Mo. banc 1997), cert. denied, 522 U.S. 1056 (1998). Should this Court grant appellant a review for plain error, appellant has the burden of demonstrating not only that the trial court erred but that the error so substantially impacted upon his fundamental rights that manifest injustice or a miscarriage of justice will result if the error is left uncorrected. State v. Hornbuckle, 769 S.W.2d 89, 93 (Mo. banc 1989), cert. denied 493 U.S. 860 (1989). "Relief under plain error, therefore, requires that appellant go beyond a mere showing of demonstrable prejudice to show manifest injustice affecting his substantial rights." Id. Plain error review places a far greater burden on appellant than had he preserved the claim for appeal. State v. Kalagian, 833 S.W.2d 431, 434 (Mo. App., E.D. 1992). Provided appellant can establish that error occurred, he is entitled to relief "only when the error so substantially affects the rights of the accused that a manifest injustice or miscarriage of justice inexorably results if left uncorrected." State v. West, 849 S.W.2d 671, 674 (Mo. App., E.D. 1993).

Appellant in the present case cannot show that the trial court plainly erred in admitting State's Exhibit 1A.

***A. Best Evidence Rule***

Appellant first argues that State's Exhibit 1A violated the best evidence rule because the rule required the introduction of State's Exhibit 1, the original surveillance tape (App. Br. 25-26).

The best evidence rule requires that the original of a tape recording be produced unless: (1) the original is unavailable; (2) for a reason which is not the proponent's fault, and (3) the secondary evidence is trustworthy. State v. Richard, 798 S.W.2d 468 (n1) (Mo. App., S.D. 1990); State v. Strothers, 789 S.W.2d 723, 724 (Mo. App., S.D. 1990); State v. King, 557 S.W.2d 51, 54 (Mo. App., St.L.D. 1977).

In the present case, the state showed that the original was unavailable for viewing. The state's evidence showed the original surveillance tape was not compatible with the type of VCR "that we have in the courtroom or at home," and that if viewed on a regular VCR State's Exhibit 1 "would flash through the pictures real quick [and] [w]e would not be able to see anything" (Tr. 178-179). Thus, the state met its burden of showing that the original was unavailable.

Next, the unavailability was not due to the state's fault. The state had no control over the choice of surveillance equipment used by Shop N' Save. The only way the state could play the surveillance tape for the jury was to transfer the recording onto a regular VCR tape, which the state did (Tr. 179, State's Exhibit 1A). Therefore, appellant cannot show that the unavailability was caused by the state's actions.

Lastly, the evidence showed that State's Exhibit 1A was an accurate copy of State's Exhibit 1. Topper testified that he viewed both the original surveillance tape (State's Exhibit 1) and the duplicate (State's Exhibit 1A), that State's Exhibit 1A was a true copy of State's

Exhibit 1 and that it accurately depicted the events of May 28 (Tr. 181-182). Accordingly, the state met its burden of showing that State's Exhibit 1A was trustworthy and the exhibit was properly admitted.

***B. State's Exhibit 1A was not a summary of State's Exhibit 1***

Appellant next claims that State's Exhibit 1A was a inadmissible summary of State's Exhibit 1 (App. Br. 24-25).

A summary is a collation of voluminous records made by a competent witness for the purpose to facilitate the a jury to understand evidence otherwise difficult to extrapolate from the sheer mass of records. Killian Const. Co v. Tri-City Const. Comp., 693 S.W.2d 819, 834 (Mo. App., W.D. 1985). As discussed in Point I, supra, State's Exhibit 1A omitted only portions of the original surveillance tape on which appellant did not appear (Tr. 193). The selected portions were not a summary of voluminous records, but duplicated the relevant excerpts from the original tape. Therefore, appellant cannot show that State's Exhibit 1A was admitted as a summary of the original tape.

***C. Rule of Completeness***

Appellant further argues that the completeness rule prevented the state from presenting State's Exhibit 1A because it did not include the entire recording from State's Exhibit 1 (App. Br. 25-26).

The rule of completeness, which seeks to ensure that a statement, or here a motion picture, is not admitted out-of-context is violated only when the statement is in an edited form that distorts its meaning or excludes information that is substantially exculpatory to the declarant. State v. Skillicorn, 944 S.W.2d 877, 891 (Mo. banc 1997) cert. denied 522 U.S. 999 (1997), State v. Williams, 97 S.W.3d 462, 468 (Mo. banc 2003), cert. denied 539 U.S. 944 (2003). The state in the present case did not introduce only selected portions of appellant's acts, but showed appellant's entire conduct captured on the surveillance tape (Tr. 179, 184, 192-194). The excluded portions on which appellant did not appear had no relevancy and were properly omitted. Accordingly, appellant cannot show that the state violated the rule of completeness.

***D. Discovery Violation***

Lastly, appellant claims that the state violated the rules of discovery by allegedly failing to disclose in timely manner State's Exhibits 1 and 1A in violation of Supreme Court Rule 25.03 and Brady v. Maryland, 373 U.S. 83 (1963) (App. Br. 28-29).

However, appellant never objected at trial to the admission of State's Exhibit 1A on basis of discovery violation (Tr. 14-15, 193-194). Appellant's failure to object to the admission of the evidence on the basis of discovery violations constitutes a waiver of her claim. *See* State v. Atchison, 950 S.W.2d 649, 653 (Mo. App., S.D. 1997)(the defendant waived any objection based on failure to disclose documentary evidence before trial when she merely continued her objection to the lack of foundation for the introduction of the documentary evidence and expert's summaries and stated no other objection when evidence

was introduced); State v. Barnett, 980 S.W.2d 297, 304 (Mo. banc 1998)(the defendant's claim of lack of disclosure of state's expert witness was waived where the defendant failed to raise an objection at the time the testimony was given).

Furthermore, appellant never alleged that she could not view the tape and the record does not support appellant's assertion that she was not advised of the content of the tape. Appellant was clearly aware of the content of the tape prior to trial when she objected to its admission on the basis of lack of foundation and argued that James Toppett did not observe the constant taping of the videotape (Tr. 14-15).

Appellant appears to argue that there was a discovery violation because the original surveillance tape was in multiplex format and appellant could not view it (App. Br. 26). However, the multiplex format of State's Exhibit 1 was not caused by bad faith on the part of the state, but resulted from the type of equipment that was used by Shop N' Save. To show a denial of due process, appellant must establish that the state acted in bad faith in failing to disclose evidence. *See* State v. Steward, 18 S.W.3d 75, 92 (Mo. App., E.D. 2000). The state in the present case did everything within its power to make the surveillance tape viewable by transferring its content onto a regular videotape (Tr. 14, 181-182). Therefore, appellant cannot establish a discovery violation.

In any event, assuming that there had been a non-disclosure or untimely disclosure, appellant cannot show manifest injustice from such non-disclosure. Appellant was able to use the videotape to argue her theory of the crime (Tr. 286-291). In light of appellant's beneficial

use of the tape, she cannot show prejudice from the alleged non-disclosure of the tape. Therefore, appellant's claim should be denied.

## III.

**THE TRIAL COURT DID NOT PLAINLY ERR IN ALLOWING JAMES TOPPETT TO TESTIFY ABOUT THE EVENTS HE OBSERVED ON THE SECURITY MONITOR, BECAUSE TOPPETT'S TESTIMONY WAS NOT HEARSAY IN THAT IT WAS BASED ON HIS PERSONAL OBSERVATIONS OF THE CRIME AND THE BEST**

**EVIDENCE RULE DID NOT APPLY BECAUSE TOPPETT'S KNOWLEDGE WAS NOT BASED SOLELY ON THE VIEWING OF THE SURVEILLANCE TAPE.**

In her third point, appellant claims that the trial court plainly erred in allowing James Toppett to testify about the events he observed on the security monitor (App. Br. 30-34). Appellant argues that this testimony was hearsay and violated the best evidence rule. (App. Br. 30-34).

Appellant acknowledges that her claim is not preserved and requests plain error review (App. Br. 30). "The 'plain error' rule is to be used sparingly and may not be used to justify a review of every point that has not been otherwise preserved for appellate review." State v. Roberts, 948 S.W.2d at 592. Relief under plain error requires appellant to go beyond a mere showing prejudice and must establish injustice affecting his substantial rights. State v. Hornbuckle, 769 S.W.2d at 93. Appellant in the present case cannot show a plain error from admitting Toppett's testimony.

***A. Toppett's testimony was not hearsay***

Hearsay is out-of-court statement admitted for the truth of the matter asserted therein. State v. Walker, 755 S.W.2d 404, 406 (Mo. App., E.D. 1989). Where the witness testifies about events he witnessed and has a personal knowledge about, such testimony is not hearsay. Id.

In the present case, James Toppett testified about the events he observed on the security cameras and as they were happening (Tr. 159-177). Toppett's testimony was based on his

personal observations and was not hearsay. *See* People v. Tharpe-Williams, 676 N.E.2d at 721(the security officers who viewed the incident on a surveillance camera as it occurred had a personal knowledge of the events).

Appellant argues that Toppett's observations were not personal because he watched appellant on the security monitor (App. Br. 30-32). As discussed in Point I, supra, the fact that Toppett observed appellant's actions on a monitor as the events unfolded did not change the personal nature of his observations.

In addition, as discussed in Point I, supra, appellant did not dispute the accuracy of the surveillance tape, but argued that she was not stealing when she took the items outside the store (Tr. 286-291). Therefore, appellant cannot show manifest injustice from Toppett's testimony describing the same events depicted on the tape.

***B. Best evidence rule does not apply***

Appellant further argues that Toppett's testimony violated the best evidence rule by testifying about his observations on the security monitor (App. Br. 33-34). Appellant argues that Toppett's knowledge was based entirely on the viewing of the surveillance camera and was not personal observations (App. Br. 33-34).

The best evidence rule requires the production of the primary evidence unless the primary evidence is lost or destroyed, is outside the jurisdiction, is in possession of an adversary or is otherwise unavailable. State v. Teague, 64 S.W.3d 917, 922 (Mo. App., S.D.

2003). The rule applies when the evidence is offered to prove the terms of writing or recording. Id. "The best evidence does not exclude evidence based on personal knowledge." Id., quoting Cooley v. Dir. of Revenue, 896 S.W.2d 468, 470 (Mo. banc 1995).

In the present case, Toppett personally observed the events as they were happening and the best evidence rule did not apply. *Compare* State v. Teague, supra (best evidence rule barred the testimony of a security officer who was not present during the events depicted on the surveillance tape, but based his testimony entirely on watching the videotape of the events). Therefore, the best evidence rule did not apply and Toppett was properly permitted to testify about his personal observations. Accordingly, appellant's claim should be denied.

**IV.**

**THE TRIAL COURT DID NOT ERR 1) IN DENYING APPELLANT'S MOTION FOR ACQUITTAL BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT APPELLANT ACTED WITH THE PURPOSE OF DEPRIVING SHOP N' SAVE FROM THE STOLEN ITEMS IN THAT SHE PLACED THE ITEMS IN A BEER BOX AND LEFT THE STORE FROM THE ENTRANCE ONLY DOOR WITHOUT PAYING; 2) IN FAILING TO MAKE A FINDING THAT APPELLANT WAS A PERSISTENT MISDEMEANOR OFFENDER BECAUSE THE COURT FOUND THAT APPELLANT**

**HAD TWO PRIOR MISDEMEANOR CONVICTIONS; AND 3) IN FAILING TO MAKE A FINDING THAT APPELLANT COMMITTED A STEALING THIRD OFFENSE BECAUSE THE COURT FOUND THAT APPELLANT HAD TWO PRIOR CONVICTIONS FOR STEALING.**

In her fourth point, appellant challenges the sufficiency of the evidence. She raises four claims: 1) that there was insufficient evidence to show that appellant acted with intent to steal; 2) that the trial court failed to make a finding that appellant was a persistent misdemeanor offender; 3) that the trial court made no finding that appellant committed a two prior stealing-related offenses as required by Section 570.040. RSMo 2000; and 4) that the insufficient evidence that appellant committed a stealing third offense (App. Br. 35-40).

In reviewing a challenge to the sufficiency of the evidence, the appellate court must accept as true all of the evidence favorable to the verdict, including all reasonable inferences therefrom, and must disregard all inferences contrary to the verdict. State v. Dulany, 781 S.W.2d 52, 55 (Mo. banc 1989); State v. Grim, 854 S.W.2d 403, 405-408 (Mo. banc 1993), cert. denied 510 U.S. 997 (1993). The reliability, credibility, and weight of the witnesses' testimony is for the fact-finder to determine. State v. Sumowski, 794 S.W.2d 643, 645 (Mo. banc 1990). A fact-finder may believe all, some, or none of a witness' testimony in arriving at a verdict, and it alone resolves any contradictions or conflicts in that witness' testimony. State v. Dulany, 781 S.W.2d at 55.

**A. Appellant acted with the purpose of depriving Shop N' Save from the stolen items.**

Appellant first argues that there was insufficient evidence to show that she acted with intent to steal because the evidence showed that appellant abandoned the box with stolen items outside the store and nobody saw appellant put any items in her purse (App. Br. 37-38).

A person commits the crime of stealing when he or she "appropriates property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion." §570.030.1, RSMo. 2000.

There was sufficient evidence in the present case to support a finding that appellant acted with the purpose of depriving Shop N' Save of the Non-Drowsy Sudafed, Extra Strength Bayer Aspirin, Visine, Theraflu and orange juice that she removed from the store. Appellant selected these items from the pharmacy and the frozen section of Shop N' Save and placed them in an empty beer box, not in a shopping card or a basket provided for that purpose (Tr. 162-164, 165-168). Appellant left the store from the "entrance-only" door in the pharmacy area without paying for the items (Tr. 166-167, 169, 200). Appellant's son activated the door from the outside and allowed appellant to leave without paying (Tr. 168-169). This evidence supported a reasonable inference that appellant had the necessary purpose of depriving Shop N' Save from the stolen items as required by Section 570.030.

Appellant argues that she did not intend to steal because she abandoned the items outside the store (App. Br. 37-38). Appellant's act of abandoning the stolen goods did not

negate her intent to steal. *See* State v. Bradshaw, 766 S.W.2d 470, 472 (Mo. App., W.D. 1989)(the robber took the victim's wallet and returned it upon discovering that it did not contain money; the fact that the robber returned the wallet did not retract the crime of robbery that was completed when the wallet was removed from the victim); and State v. Cosby, 976 S.W.2d 464, 466 (Mo. App., E.D. 1998)(the defendant who removed keys and business cards from the victim's pockets had the intent to steal even if he removed these items so that he could continue to search the victim's pockets).

**B. The trial court made a finding that appellant was a prior misdemeanor offender.**

Appellant next claims that the trial court did not find her to be a persistent misdemeanor offender because the court announced that appellant was a "prior and persistent offender." (App. Br. 39-40).

***A. Facts***

Appellant committed the crime for which she was on trial on May 28, 2001 (Tr.158-160). She was tried on May 1 and 2, 2002 (L.F. 5, 25; Tr. 5 ). Prior to trial, the state proved that appellant had two prior misdemeanor convictions for stealing (Tr. 7-9). The state's

presented certified copies from causes No.98CR-6111 and No.99CR-2896 showing that on November 4, 1999, appellant pled guilty to two class A misdemeanors of stealing in the Circuit Court of St. Louis County (L.F. 7-8, Tr. 7-9, State's Exhibits A and B).[2] Appellant stated that she had no objection to the authenticity of the state's proof (Tr. 8). The court accepted the state's proof and announced that appellant was "a prior and also persistent offender" (Tr. 9, L.F. 39). The court held that the punishment was to be assessed by the court (Tr. 9, 39).

On December 6, 2002, the court issued a written judgment and sentence reflecting that appellant was a "persistent misdemeanor offender pursuant to §558.016 RSMo" and sentencing her to four years in the Department of Corrections (Sent. Tr. 2-25, L.F. 70).

On December 15, appellant filed a motion alleging that pursuant to an amendment to Section 570.040, appellant must have served at least ten days in jail for her prior stealing convictions before the state could charge her with the class C felony of stealing third offense (L.F. 78-80). §570.040, RSMo 2000, Cum. Supp. 2002 (effective August 28, 2002). The state agreed that it did not prove that appellant served any time for the stealing convictions that the state used to enhance the crime to a class C felony (Sent. Tr. 26-32).

On December 19, 2002, the trial court resentenced appellant to a misdemeanor punishment of nine months imprisonment pursuant to Section 1.160 RSMo (Sent. Tr. 28-29,

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[2] Respondent has included copies of appellant's convictions in the Appendix to this brief. They have been labeled for convenience as State's Exhibit A and State's Exhibit B. Respondent has requested certified copies of these records and will file them with this Court upon receipt.

33; L.F. 84). *See* §1.160, RSMo 2000 ("[I]f the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense prior to original sentencing, the penalty or punishment shall be assessed according to the amendatory law").

***B. Analysis***

Appellant does not challenge the sufficiency of the state's proof that she committed two misdemeanor offenses at a different time as required by Section 558.016.5 RSMo. Rather, she argues that the trial court erred in sentencing her as a persistent misdemeanor offender because the court announced that she was a "prior and persistent offender" (App. Br. 39-40).

An oral sentence generally controls over an inconsistent writing. State v. Young, 969 S.W.2d 362, 364 (Mo. App., E.D. 1998). However, this rule has no application where the record shows that the oral sentence was not materially different from the written one. State v. Johnson, 938 S.W.2d 264, 265 (Mo. banc 1997).

In the present case, there was no material difference between the oral and written sentences. The state presented proof of two prior misdemeanor convictions in the Circuit Court of St. Louis County, the court accepted the state's proof and reflected in the written judgment and sentence that appellant was a persistent misdemeanor offender (Tr. 7-9, L.F. 76).

While the court announced that appellant was a "prior and also persistent offender," it is clear that the court relied on the state's proof of two prior misdemeanor convictions and found appellant to be a "persistent misdemeanor offender pursuant to §558.016 RSMo"(Tr. 7-9, L.F. 39, 76). Therefore, appellant cannot show that there was a material difference between the oral and written findings of appellant's persistent misdemeanor offender status.

Furthermore, appellant cannot show prejudice from the court's finding. As discussed above, the state presented evidence of two prior misdemeanor convictions consisting of certified copies of causes No.98CR-6111 and No.99CR-2896 showing that appellant pled guilty to two misdemeanor stealings in the Circuit Court of St. Louis County (L.F. 7-10, Tr. 7-9, State's Exhibits A and B). The trial court accepted the state's proof and found that the punishment was to be assessed by the court (L.F. 39). The trial court may take a judicial notice of its own records of prior proceedings between the same parties. State v. Dillon, 41 S.W.3d 479, 482 (Mo. App., E.D. 2000). Accordingly, appellant was properly found to be a persistent misdemeanor offender.

In addition, on December 19, the trial court gratuitously resentenced appellant to a misdemeanor punishment without considering any prior convictions and omitted her persistent misdemeanor offender status from the written judgement and sentence (L.F. 84, Sent Tr. 26-33). Thus, assuming that the court erred in finding that appellant was a prior and persistent offender, as opposed to a persistent misdemeanor offender, appellant cannot show prejudice.

**C. The trial court made a finding that appellant committed two prior stealing-related offenses.**

Appellant next claims that the trial court failed to make a finding that she committed two prior stealing-related offenses as required by Section 570.040 RSMo (App. Br. 38-39). Appellant argues that the court announced that she was a prior and persistent offender, but never made a finding that she committed two prior stealing-related offenses (App. Br. 38-39).

Contrary to appellant's assertion, the trial court found that appellant committed two prior misdemeanor stealings for the purposes of the enhancing the offense to a class C felony of stealing (Tr. 10-11, L.F. 39). The court based its finding on the state's proof that appellant committed two Class A misdemeanors of stealing in cause No.98CR-6111 and in cause No.99CR-2896 (Tr. 8-10). At the time appellant committed the crime, the state was required only to show that appellant committed two prior stealing-related offenses, not that she served any time for them. §570.040, RSMo 2000. While Section 570.040 was amended in 2002 to require also a proof that appellant served at least ten days in jail for the crimes, this provision was not applicable to appellant because she committed the crime in 2001. *See* §570.040, RSMo 2000, Cum. Supp. 2002 (effective August 28, 2002); MACH-CR24.02.1, Notes on Use 1 ("The legislative changes in 2002 should be used for offenses occurring on or after August 28, 2002).

Furthermore, as discussed above, the state presented evidence of two prior stealing convictions consisting of certified copies of causes No.98CR-6111 and No.99CR-2896,

which showed that appellant pled guilty to two class A misdemeanors of stealing in the Circuit Court of St. Louis County (L.F. 7-10, Tr. 7-9, State's Exhibits A and B). The trial court accepted the state's proof of two prior misdemeanor stealings, and found that appellant committed a stealing third offense (Tr. 10-11). Therefore, appellant cannot show that the trial court erred in finding that she committed a stealing third offense.

**D. There was sufficient proof that appellant committed stealing third offense.**

Lastly, appellant claims that the state failed to make a submissible case of stealing third offense because the trial court did not find that appellant committed two prior offenses of stealing (App. Br. 35, 39). Appellant essentially retaliates her argument that the trial court failed to make a finding that she committed two prior stealing-related offenses, which precluded the state from charging her with stealing third offense (App. Br. 39-40).

As discussed above, the state presented certified copies of two Class A misdemeanors of stealing in causes No.98CR-6111 and No.99CR-2896 to which appellant pled guilty in the Circuit Court of St. Louis County (Tr. 7-8). The court accepted the state's proof and found that committed the class C felony of stealing third offense (Tr. 10-11). Therefore, appellant cannot show that the trial court erred in finding that she had two prior stealing-related offenses, and appellant's claim should be denied.

## CONCLUSION

In light of the foregoing, respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 7,207 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee anti-virus software, and is virus-free; and

3. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ___ day of July, 2004 to:

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